

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DONALD HARRELL</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 190,912
<b>CRQUI CONSTRUCTION COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>INSURANCE COMPANY OF NORTH AMERICA</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier requested the Appeals Board to review the Award dated April 25, 1997, entered by Administrative Law Judge Floyd V. Palmer. The Appeals Board heard oral argument in Topeka, Kansas, on October 15, 1997.

**APPEARANCES**

John J. Bryan appeared for the claimant. Michael W. Downing appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the Appeals Board takes official notice of the Order dated October 1, 1996, entered by the District Court of Osage County, Kansas, In the Matter of the Guardianship and Conservatorship of Donald W. Harrell, Case No. 94-GC-5. However, numerous other documents which are attached to claimant's submission letter or brief as either evidence or argument and which were not otherwise properly introduced into evidence are not part of the evidentiary record and any reference to that information in a submission letter or brief is inappropriate and has not been considered.

### ISSUES

The Administrative Law Judge ordered the respondent to pay for claimant's long-term living and rehabilitation expenses in Tangram in San Marcos, Texas. Respondent and its insurance carrier requested the Appeals Board to review that order. They contend they provided claimant with appropriate treatment and rehabilitation at Learning Services in Lakewood, Colorado, and contend they have the absolute right to control claimant's medical care and rehabilitation.

Claimant's co-guardians object to claimant's residing at Learning Services on three grounds. First, because of the facility's location, claimant's family members are unable to visit on a regular basis or take part in claimant's rehabilitation program. Second, the family is concerned that claimant has regressed while at Learning Services and contends the treatment and rehabilitation program offered there is inadequate. Third, claimant would be better served if he were placed in Tangram in San Marcos, Texas, which the family believes offers a better rehabilitation program and where the family members could visit and actually participate in the rehabilitation process. Claimant's co-guardians also contend they have the right to select where claimant resides.

### FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

- (1) On April 13, 1994, claimant was in a train wreck which left him with brain damage and in need of long-term, 24-hour supervision. The parties stipulated claimant's accident arose out of and in the course of his employment with the respondent and that the accident left claimant permanently and totally disabled. The parties also agree claimant, who is now 47 years old, requires long-term care.
- (2) As a result of the accident, claimant has significant physical, cognitive, language, and behavioral deficits. In addition to brain injury, claimant also injured his right knee in the accident. Claimant sometimes needs external cues to carry out his activities except for bowel and bladder management. For example, he requires verbal cues to get out of bed in the morning, shower, and go to breakfast. Claimant will probably remain severely disabled and need someone to manage his medications, money, and plan his shopping and meals for the rest of his life.
- (3) In April 1996, respondent and its insurance carrier placed claimant in Learning Services in Lakewood, Colorado, which provides post-acute neuro rehabilitation services and programs to people with traumatic brain injury and stroke.
- (4) Based on the testimony of its former program director and former regional vice president Kenneth R. Hosack, the Appeals Board finds Learning Services offers 24-hour supervised care which includes a structured program of activities from 8 a.m. to 6 p.m. daily. Mr. Hosack indicated Learning Services charges \$640 per day for the initial 30 days

and a base rate of \$180 per day afterwards. In addition to the base rate, Learning Services charges additional amounts for physical, speech, and language therapies and vocational rehabilitation. Speech and physical therapy would cost \$120 per hour. Vocational rehabilitation or sheltered workshop would cost approximately \$30 per day. Ancillary expenses such as routine medical care, dental care, prescription medication, recreation, and clothing would cost an additional \$50 to \$70 per day. Due to cost, the respondent and its insurance carrier prefer Learning Services over Tangram for claimant's long-term care and rehabilitation.

(5) Based on the testimony of its executive director J. David Seaton, the Appeals Board finds Tangram in San Marcos, Texas, is a post-acute treatment facility that specializes in long-term brain injury rehabilitation. Tangram provides a community setting where individuals are involved in structured activities from 6:30 a.m. to 10 p.m. daily. Tangram charges \$275 per day which could fall to \$225 per day should claimant progress to where he could reside in a less restrictive setting. Unlike Learning Services, Tangram's per diem rate includes all speech, language, physical, and vocational therapies. In addition, the per diem rate also includes monitoring of medications as well as claimant's recreation expense. Dental care, medical treatment, and clothing are additional.

(6) Both Learning Services and Tangram provide supported living programs which are designed for severely injured people who have definite needs and cannot be managed at home by their families. Tangram encourages families to attend and participate in the treatment program. Its philosophy is to formulate a treatment program which provides the highest quality of life for its clients.

(7) Based upon the testimony of both Mr. Hosack and Mr. Seaton, a nursing home would not provide appropriate care and rehabilitation treatment. Without an appropriate rehabilitation program and appropriate living services, claimant is at risk for increased behavioral problems and agitation. The Appeals Board finds a nursing home is not an appropriate facility where claimant should reside.

(8) Claimant's co-guardians prefer Tangram because family members live closer and could actively participate in claimant's long-term rehabilitation program. Claimant's younger sister and co-guardian, Beverly Howe, maintained close contact with claimant when he was undergoing rehabilitation in Austin, Texas, in January 1995. She lives approximately 90 miles from San Marcos, Texas, and believes she could visit claimant at least every third weekend and perhaps more. Also, claimant's parents reside in Texas on Ms. Howe's property from Christmas until April or May every year and would be available to visit their son on a regular basis during those months.

(9) After claimant was transferred to Learning Services, in June 1996 he began to experience seizure-like shutdown behavior where he would be nonresponsive to touch or voice and would display eye rolling. Although the record lacks an expert medical opinion as to the cause, the shutdown behavior began shortly after the facility reduced claimant's prescription medication at the family's request. The shutdowns grew progressively worse

and culminated in claimant's hospitalization in July 1996. The neurologist who treated claimant at that time determined claimant was not having seizures and believed the behavior was mood related. Claimant's prescription of Elavil was then increased to preadmission levels and the shutdown behavior then decreased. When Learning Services' Dannette Rausch testified in September 1996, claimant's shutdowns had decreased to approximately one per week.

(10) Since entering Learning Services, both claimant's verbal and physical aggression have increased. Learning Services has recommended that claimant be placed in one of its smaller facilities but claimant's family decided against the transfer because of the shutdown behavior.

(11) Claimant's co-guardians are dissatisfied with the care claimant has received from Learning Services and desire claimant to be placed at Tangram. One of the co-guardians, claimant's daughter Kelly Herndon, believes claimant's language skills and ability to walk regressed while her father was at Learning Services. She is also displeased because claimant did not make regularly scheduled telephone calls to family members and that she was not immediately notified of her father's shutdown behavior. She is also displeased that Learning Services did not personally notify her of her father's hospitalization in July 1996 and that it has not provided her with an accounting of the money she has sent for her father. Because it lacks an onsite vocational rehabilitation training program, co-guardian Beverly Howe is also concerned with claimant residing at Learning Services. She generally prefers Tangram because of its programs and the close interaction she personally observed between the staff and clients. For those and other reasons, she believes Tangram is more appropriate for claimant than the other facility.

(12) Because of the potential for family involvement and the longer hours of daily structured activities, the Appeals Board finds, among other reasons, that the Tangram program would better provide the care and rehabilitation which claimant requires. In addition, considering the specific facts of this case, the Appeals Board finds that the services provided by Learning Services were not satisfactory and that claimant's condition deteriorated while residing at that facility.

(13) By Order dated October 1, 1996, the District Court of Osage County, Kansas, in Case No. 94-GC-5 ordered the co-guardians to move claimant to a care facility within 150 miles of the residence of one of the co-guardians and also authorized the co-guardians to move claimant to Tangram in San Marcos, Texas.

CONCLUSIONS OF LAW

The Administrative Law Judge found that claimant's condition had deteriorated while he was at Learning Services and that the District Court had ordered the co-guardians to move claimant to Tangram. Based upon those findings and citing K.S.A. 59-3018, the Administrative Law Judge ordered that claimant's residence shall be selected by his guardians in accordance with the District Court's Order and that claimant was to reside at Tangram with respondent paying the cost of the long-term care.

As indicated above, respondent and its insurance carrier object to paying for treatment at Tangram because they prefer Learning Services due to its lower cost. In support of their position, they contend respondent, pursuant to K.S.A. 44-510 and 44-515, has the absolute right under the Workers Compensation Act to control claimant's medical care and rehabilitation. Claimant, on the other hand, contends his co-guardians have the right to designate his residence as long as they comply with the District Court's Order in the guardianship proceeding. Claimant also contends he is entitled to a change of health care providers pursuant to K.S.A. 44-510(c)(1) as the services obtained from Learning Services were not satisfactory.

Neither party cited any appellate court cases which dealt with the issue now before us. Likewise, the Appeals Board is unaware of any such appellate court decision. Therefore, the Appeals Board is left solely with the language of the Act and the Kansas Administrative Regulations in resolving this appeal.

K.S.A. 44-510 provides in part:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, **as may be reasonably necessary to cure and relieve the employee from the effects of the injury.** . . . (Emphasis added.)

(a)(2) The director shall prepare and adopt rules and regulations, which shall be in effect on or before July 1, 1993, and which establish a schedule of maximum fees for medical, surgical, hospital, dental, nursing, vocational rehabilitation or any other treatment or services provided or ordered by health care providers and rendered to employees under the workers compensation act. **The schedule shall include provisions and review procedures for exceptional cases involving extraordinary medical**

**procedures or circumstances** and shall include costs and charges for medical records and testimony. (Emphasis added.)

(a)(3) The schedule of maximum fees shall be reasonable, shall promote health care cost containment and efficiency with respect to the workers compensation health care delivery system, and **shall be sufficient to ensure availability of such reasonably necessary treatment**, care and attendance to each injured employee **to cure and relieve the employee from the effects of the injury**. (Emphasis added.)

(a)(4)(A) In every case, all fees, transportation costs, charges under this section and all costs and charges for medical records and testimony shall be subject to approval by the director and shall be limited to such as are fair, reasonable and necessary. . . .

(a)(4)(C) All fees and other charges paid for such treatment, care and attendance, including treatment, care and attendance provided by any health care provider, hospital or other entity providing health care services, shall not exceed the amounts prescribed by the schedule of maximum fees established under this section or the amounts authorized pursuant to the provisions and review procedures prescribed by the schedule for exceptional cases. A health care provider, hospital or other entity providing health care services shall be paid either such health care provider, hospital or other entity's usual charge for the treatment, care and attendance or the maximum fees as set forth in the schedule, whichever is less. . . .

(a)(5) Any contract or any billing or charge which any health care provider, vocational rehabilitation service provider, hospital, person, or institution enters into with or makes to any patient for services rendered in connection with injuries covered by the workers compensation act or the fee schedule adopted under this section, which is or may be in excess of or not in accordance with such act or fee schedule, is unlawful, void and unenforceable as a debt.

(a)(6) The director shall have jurisdiction to hear and determine all disputes as to such charges and interest due thereon and shall prescribe procedural rules to be followed by the parties to such disputes.

(a)(7) If the director finds, after utilization review and peer review, that a provider or facility has made excessive charges or provided or ordered unjustified treatment, services, hospitalization or visits, the provider or facility shall not receive payment pursuant to this section from an insurance carrier, employer or employee for the excessive fees or unjustified treatment,

services, hospitalization or visits and such provider or facility shall repay any fees or charges collected therefor. . . .

(a)(14) As used in this subsection (a), unless the context or the specific provisions require otherwise, “provider” means any health care provider or vocational rehabilitation service provider, and “facility” means any facility providing health care services or vocational rehabilitation services, or both, including any hospital.

(b) Any health care provider, nurse, physical therapist, any entity providing medical, physical or vocational rehabilitation services or providing reeducation or training pursuant to K.S.A. 44-510g and amendments thereto, medical supply establishment, surgical supply establishment, ambulance service or hospital who accept the terms of the workers compensation act by providing services or material thereunder shall be bound by the fees approved by the director and no injured employee or dependent of a deceased employee shall be liable for any charges above the amounts approved by the director.

(c)(1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider.

Kansas Administrative Regulation (K.A.R.) 51-24-2 provides as follows:

If an employee sustains a severe injury, the timing and coordination of all medical services shall be considered of utmost importance in order for the employee to achieve **maximum recovery from the effect of the injury**. Severe injuries shall be defined as those cases where the worker sustains an amputation, damage to the spinal cord, brain or other types of severe disability injuries. When a severe injury does occur, the employer, or self-insured employer or insurance carrier shall be in contact with the rehabilitation administrator immediately in order to gain the rehabilitation administrator’s aid in the coordination of essential services. **Priority shall be given to the determination of the specialized facility for the injured employee and, in this consideration, a determination shall be made as to which specialized facility would best provide the medical treatment and physical rehabilitation for the injured worker.** (Emphasis added.)

Although respondent and its insurance carrier partially premise their argument upon K.S.A. 44-515, that statute offers little assistance resolving this appeal as it applies to an

employer's right to require an injured worker to submit to an examination twice a month unless otherwise ordered. It is not relevant to the issue now before us.

Based upon the above statutes and regulations, in answering the question where claimant should reside, the Appeals Board finds the standard to be applied is which facility would better provide the treatment and rehabilitation services that claimant needs. As indicated above, the Appeals Board has determined that Tangram would better serve claimant's long-term rehabilitation needs. However, the responsibility of respondent and its insurance carrier for payment of Tangram's costs is limited to that either set forth in the fee schedule promulgated pursuant to K.S.A. 44-510(a)(2) or those amounts authorized for exceptional cases. Also, respondent and its insurance carrier may utilize the peer review and utilization review procedures to avoid payment of excessive fees and charges in accordance with the procedures contained in K.S.A. 44-510(a)(6) through (13).

Therefore, the Appeals Board finds the respondent and its insurance carrier should pay claimant's costs for his care and treatment in Tangram subject, of course, to the director's medical fee schedule and the schedule's review procedures, as well as utilization and peer review.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated April 25, 1997, entered by Administrative Law Judge Floyd V. Palmer should be, and hereby is, affirmed subject to the above limitations.

#### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Topeka, KS  
Michael W. Downing, Kansas City, MO  
Floyd V. Palmer, Administrative Law Judge  
Philip S. Harness, Director